UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RIVERVIEW APARTMENTS LIMITED PARTNERSHIP,	)	
Plaintiff	)	
v.	)	Civil No. 96-0011-B
BARBARA SCHWARTZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER SCHWARTZ,	)	
Defendant	)	

MEMORANDUM OF DECISION[1]

This is an action seeking, among other things, a declaration that a mortgage executed by Plaintiff in favor of Defendant's decedent is invalid. Defendant has filed a counterclaim. The matter has been presented to the Court on the parties' joint Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). The parties have filed a Stipulated Record upon which the Court is asked to make conclusions of law, and memoranda briefing the issues raised in the Complaint. Included in Plaintiff's memorandum are two requests which the Court construes as a Motion to Amend the Complaint. Defendant's counsel having orally indicated Defendant does not object, the Motion to Amend the Complaint to substitute the party Defendant and to include a request that the Court direct Defendant to execute a discharge of the mortgage in question is hereby GRANTED. Barbara Schwartz, as Trustee of the Peter Schwartz Living Trust, is hereby substituted as party Defendant in this action.

[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

Stipulated Facts

The Riverview Limited Partnership ["RIVERVIEW"] was formed between P.I. Realty Management, Inc. ["P.I. REALTY"] and Gleich by agreement dated February 25, 1976. Pursuant to the agreement, Gleich was the sole limited partner owning 95 percent of Riverview. P.I. Realty was the sole general partner owning the remaining five percent. Darrell Cooper was the sole shareholder of P.I. Realty, a Maine corporation.

In addition, the Agreement contained the following relevant language:

> Except as otherwise set forth elsewhere in this Agreement, the Managing Partner (acting for and on behalf of the Partnership), in extension and not in limitation of the rights and powers given by law or by the other provisions of this Agreement, shall, in its sole discretion, have the full and entire right, power and authority in the management of the Partnership business to do any and all acts and things necessary, proper, convenient or advisable to effectuate the foregoing grant of authority, but subject to the other provisions of this Agreement, the Managing General Partner shall have the right, power and authority acting for and on behalf of the Partnership, to lease, sell, mortgage, convey, refinance, grant easements on or dedicate the property (or any part thereof) of the Partnership . . . . In furtherance and not in limitation of the foregoing provisions and of the other provisions of this Agreement, the Managing General Partner is specifically authorized and empowered to execute and deliver, on behalf of the Partnership, any and all instruments and documents as shall be required by Section 8 of the National Housing Act or by the mortgagee in connection with such loan, including but not limited to executing any mortgage, note, contract, bank resolution and signature card, release, discharge, or any other document or instrument in any way related thereto or necessary to appropriate in connection therewith. No person dealing with the Managing General Partner shall be required to determine its authority to do any act on behalf of the Partnership, nor to determine any fact or circumstances bearing upon the existence of such authority.

Agreement, Section 9(B).

> The power of the Managing General Partner to sell, assign, convey or otherwise transfer all or any part of the Partnership real property will not be made without the prior written consent of the Limited Partner;

Agreement, Section 9(C)(2).

Riverview was formed for the purpose of developing a project in Dover-Foxcroft, Maine. The project was, in fact, developed, and P.I. Realty was made managing partner of the project. As such, it had access to and control over Riverview finances.

The project was subject to Section 8 of the National Housing Act and the rules and regulations of the Maine State Housing Authority. Pursuant to these rules and regulations, Riverview was required to maintain various reserve accounts for the purpose of maintaining the project.

On July 10, 1990, Peter Schwartz loaned Cooper $45,000.00; on August 25, 1992, he loaned Cooper $30,000; and on March 16, 1994, he loaned Cooper $33,000. On or about May 27, 1994, Peter Schwartz's attorney contacted Cooper, demanding repayment. Cooper responded by offering the Riverview project as security for the loans. Cooper indicated Riverview was slated for sale during the summer of 1994. Cooper did not indicate he would need anyone's consent to encumber the Riverview project.

On June 6, 1994, Schwartz's attorney asked an attorney in Milo to perform a preliminary title search on the Riverview project. The search revealed a prior mortgage executed by Cooper as President of P.I. Realty, general partner. Using these preliminary title documents, Schwartz's attorney began preparing a property description.

On June 13, 1994, Schwartz's attorney wrote to Cooper and asked Cooper to provide a copy of the Agreement and evidence of the pending sale of the project. Cooper responded by providing a copy of the Agreement and a document indicating that there was to be a sale of the Riverview property during the summer of 1994. By June 14, 1994, Schwartz's attorney had reviewed the

MSHA mortgage documents, and he concluded that those mortgage documents contained no restrictions on granting junior mortgages on the property.

On June 22, 1994, Cooper disclosed to Schwartz's attorney that he may have needed permission from his limited partner and MSHA to execute the mortgage. The attorney reviewed the Maine version of the Uniform Revised Limited Partnership Act and concluded that a general partner does not need the permission of the limited partner to guarantee debts of the general partner nor to encumber the assets of the limited partnership for the general partner's purposes. He also concluded from reviewing the Agreement that Cooper possessed the authority to execute the Mortgage. Cooper executed the Mortgage on June 27, 1994.

On the same day, Cooper delivered a letter to Schwartz's attorney's office stating as follows:

> Enclosed herewith is a legal description of Riverview Apartments. As I indicated, I do need approval from the Maine State Housing Authority to record the second mortgage and possibly the approval of my limited partner. If you have any questions, please feel free to contact me.

Neither Mr. Schwartz nor his attorney received the letter before Cooper had executed the mortgage. The mortgage was recorded on June 29, 1994, at the Piscataquis County Registry of Deeds in Volume 946 at Page 313. Neither Mr. Schwartz nor his attorney obtained permission from anyone prior to recording the mortgage.

Cooper never discussed the mortgage with Gleich, and Gleich never knew of it, prior to the time it was executed and recorded.

Conclusions of Law

Defendant asserts that her late husband was entitled to rely on the language in the Agreement which provided that no third party would be required to inquire as to the general partner's authority to act. In support of this contention, Defendant cites a case from New York State, in which it was held that a bank was the holder in due course of certain notes it purchased from one of the general partners. *Chemical Bank v. Haskell*, 411 N.E.2d 1339 (N.Y. 1980). The case does little to support Defendant's position, however, in that it arose under the Uniform Commercial Code, not the Uniform Revised Limited Partnership Act. *Id*. at 1340. The issue before the court was whether the bank was a holder in due course of certain notes it purchased from the general partner in a limited partnership. Under the applicable section of the UCC, the inquiry was whether the bank had "'knowledge of the claim or defense or knowledge of such facts that his action in taking the instrument amounts to bad faith.'" *Id*. at 1341. Under the facts before it, the court concluded that Chemical "had reason to believe that [the general partner] was acting for a partnership purpose at the time that it sold the notes and received the proceeds." *Id*. at 1342.

This case can be distinguished not only on the applicable law, but on the facts. It is undisputed that Defendant's attorney reviewed the Agreement prior to accepting and recording the mortgage. The Agreement clearly provides that the General Partner required the written consent of the Limited Partner prior to encumbering the property. Further, the Agreement absolved third parties of responsibility for investigating the General Partner's authority only with respect to those acts done "on behalf of the Partnership." It is disingenuous for Defendant's counsel now to argue that the language in the Agreement "was a direct communication to Defendant from the principal that the authority was not only present but also not to be questioned."

The decedent clearly understood that the mortgage he sought would secure prior loans made, not to Riverview, or even P.I. Realty, but to Darrell Cooper. The Court does not find the language of the Agreement bestowed even apparent authority upon Darrell Cooper to encumber the assets of Riverview for his own purposes. Accordingly, the mortgage is void as having been executed without authority, and Plaintiff is entitled to judgment on Count I of the Complaint.

Further, the Court is satisfied that the mortgage is in any event invalid for lack of consideration. It is not necessarily fatal to Defendant's claim to the property that the 'benefit,' in this case the Schwartz-to-Cooper loans, was received by Darrell Cooper, rather than Riverview. Third parties may receive the promised consideration in a mortgage context if that is the intent of the promisee. *In re Rolfe*, 710 F.2d 1, 3 (1st Cir. 1983) (cited in *Kennebec Savings Bank v. West*, 538 A.2d 303, 304 (Me. 1988)). In addition, the Court is unpersuaded by Defendant's unsupported argument that a pre-existing obligation cannot be valid consideration.

The Court is satisfied, however, that the "consideration" in this matter is not valid because it was not bargained for. The loan and mortgage transactions were negotiated between Defendant and Darrell Cooper for their own benefit. Riverview played no part in those negotiations, and indeed only suffered as a result of the bargain. *Cf., In re Kennebago Corp.*, 50 B.R. 153 (Bankr. D. Me. 1985) (mortgage, executed as part of sale by stockholders of shares of corporate debtor, held void for lack of consideration since sellers failed to show why debtor, not a party to the transaction, would encumber its only asset to secure payment of buyer's obligation). Accordingly, the Court finds the mortgage is void for want of consideration, and Plaintiff is entitled to judgment on Count III of his Complaint.

Conclusion

Judgment shall enter in Plaintiff's favor as against Defendant on Counts I and III of the Complaint. Inasmuch as Plaintiff has not sought judgment on Count II, judgment shall enter in Defendant's favor as against Plaintiff on Count II. On the basis of the judgment in Plaintiff's favor on Counts I and III, Defendant is hereby ORDERED to execute a discharge of the mortgage.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on January 22, 1997.